IN THE COURT OF APPEALS OF IOWA

No. 8-785 / 08-0299 Filed January 22, 2009

KAJAL PROPERTIES, LLC, an Iowa limited liability company, and PRAVIN (PAUL) O. DESAL, an individual,

Plaintiffs-Appellants,

VS.

DAKOTA TITLE & ESCROW CO., a Nebraska corporation, and PATRICIA R. AISTROPE, an individual,

Defendants and Third-Party Plaintiffs-Appellees.

VS.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, an Arizona Corporation,

Third-Party Defendant.

Appeal from the Iowa District Court for Mills County, Charles L. Smith III, Judge.

The plaintiffs appeal from the district court order granting the defendants' motion for summary judgment on its claims of negligence, negligent misrepresentation, and fraudulent misrepresentation. **AFFIRMED.**

Bruce B. Green and Philip Willson of Willson & Pechacek, P.L.C., Council Bluffs, and David J. Skalka of Croker, Juck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., Omaha, Nebraska, for appellants.

Robert J. Becker of Stalnaker, Becker & Buresh, P.C., Omaha, Nebraska, and Curtiz J. Heithoff, Council Bluffs, for appellee Patricia Aistrope.

Tim B. Streff, Omaha, Nebraska, and Joseph C. Byam of Byam & Hoarty, P.C., Omaha, Nebraska, for appellee Dakota Title.

Heard by Eisenhauer, P.J., and Potterfield, J., and Robinson S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

EISENHAUER, J.

The plaintiffs, Kajal Properties, L.L.C. and Pravin Delai, appeal from the district court order granting the defendants', Dakota Title & Escrow Co. and Patricia R. Aistrope's, motion for summary judgment on their claims of negligence, negligent misrepresentation, and fraudulent misrepresentation. They contend the court erred in applying the theories of res judicata and issue preclusion. We affirm.

I. Background Facts and Proceedings. In 2000, the plaintiffs purchased a Ramada Hotel in Omaha, Nebraska. Before purchasing it, they obtained a title insurance commitment from Fidelity National Title Insurance Company (Fidelity) through its local agent, Dakota Title & Escrow Co. (Dakota Title). The policy was issued to the plaintiffs shortly after closing.

The plaintiffs later discovered that there were three unreleased mortgages on the hotel that had not been shown on the title insurance commitment. The mortgages had been paid but not released. As a result of these liens, the plaintiffs allege they have been monetarily damaged.

The plaintiffs have brought a myriad of litigation against Fidelity and Dakota Title based on these events. In April 2002, Kajal sued Fidelity in Nebraska state court. The case was dismissed three months later without prejudice because the plaintiff's attorney was not properly admitted to practice in Nebraska. In April 2004, Kajal filed a third-party petition against Fidelity and Dakota Title in United States Bankruptcy Court in Nebraska, alleging breach of policy and slander of title for the failure to get the three mortgages released. In May 2005, the Bankruptcy Trustee dismissed the underlying action resulting in

dismissal of Kajal's claim. Also, in April 2004, Kajal and other plaintiffs filed suit in California state court against several defendants, including Fidelity and Dakota Title. The present case was filed while the California action was pending. In December 2006, Kajal and Desai filed suit against Fidelity in the United States District Court for the District of Nebraska with the same causes of action as the California litigation. On August 21, 2007, the federal court, referring to the California litigation and applying the doctrine of res judicata, dismissed the suit. The court stated:

The language from Plaintiffs' previously litigated cases demonstrate that Plaintiffs have not, as they now claim, previously limited their focus to the title policy. Rather, Plaintiffs' previous claims have brushed broad strokes of accusation involving failure to disclose information prior to purchasing the title policy.

Of particular relevance here is the suit the plaintiffs brought in California in 2004. The claims against Dakota Title were for breach of the title insurance policy, breach of escrow instructions, and negligence, and against Fidelity for negligence, negligent misrepresentation, fraud, breach of contract, and a violation of California's Business and Professions Code. Dakota Title was dismissed from the case for lack of personal jurisdiction. The plaintiffs voluntarily dismissed with prejudice all their claims against Fidelity except for the breach of contract claim. Summary judgment was granted in favor of Fidelity on that claim and it was dismissed with prejudice.

In December 2005, the plaintiffs brought this tort action against the Dakota Title and Aistrope, alleging negligence, negligence misrepresentation, and fraudulent misrepresentation. This was the first time Aistrope had been named as a defendant. Dakota Title and Aistrope filed a cross-petition against Fidelity,

seeking indemnity and asserting that any liability on their part was Fidelity's responsibility as they acted within the scope of their agency.

Fidelity filed a motion for summary judgment, contending the claims against it had been decided in previous litigation and therefore the doctrine of res judicata barred the parties from re-asserting the claims. Dakota Title and Aistrope then filed motions for summary judgment, arguing that if res judicata applied to the claims against Fidelity, the doctrine also barred the plaintiffs from asserting the claims against them. The district court granted Dakota Title and Aistrope's motions for summary judgment and dismissed the plaintiffs' claims.

II. Scope and Standard of Review. We review rulings on motions for summary judgment for errors at law. Sain v. Cedar Rapids Cmty. Sch. Dist., 626 N.W.2d 115, 121 (lowa 2001). The record before the district court is reviewed to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. Id. We review the facts in the light most favorable to the party resisting the motion. McIlravy v. North River Ins. Co., 653 N.W.2d 323, 328 (lowa 2002). The resisting party has the burden of showing a material issue of fact is in dispute. Id.

III. Analysis. Under the doctrine of res judicata,

a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Bennett v. MC # 619, Inc., 586 N.W.2d 512, 516 (Iowa 1998) (quoting Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418, 440 (Iowa 1996)). In other

words, "the party asserting the bar must show that the first suit involved the same parties or parties in privity, the same cause of action, and the same issues." *Id.*

The policy of the law underlying claim preclusion is that a claim cannot be split or tried piecemeal. Thus, a party must try all issues growing out of the claim at one time and not in separate actions. An adjudication in a prior action between the same parties on the same claim is final as to all issues that could have been presented to the court for determination. Simply put, a party is not entitled to a "second bite" simply by alleging a new theory of recovery for the same wrong.

Id. at 516-17 (citations omitted).

The district court found the claims the plaintiffs brought against Fidelity in California arose out of the same primary rights as their claims in the current case. It further found that under California law, a dismissal with prejudice is an adjudication on the merits. The court found final judgment on the merits as to Fidelity was conclusive as to the rights of not only Fidelity, but also its privies-Fidelity's privies being its agent, Dakota, and its subagent, Aistrope. Therefore, the plaintiffs were barred from reasserting their claims against the defendants in the present action.

The plaintiffs first contend a voluntary dismissal of tort claims in California against a third party does not preclude the claims they bring now against the defendants. They assert California law holds that there is no res judicata benefit to an agent for the voluntary dismissal of a claim against a principal.

The Full Faith and Credit Clause of the United States Constitution requires the courts of each state to give a judgment of another state the same preclusive effect as it has in the state in which it was rendered. *Edward Rose Bldg. Co. v. Cascade Lumber Co.*, 621 N.W.2d 193, 194-95 (lowa 2001). Accordingly, the

district court applied California law in determining the preclusive effect of the plaintiffs' dismissal with prejudice of its action against Fidelity. The district court cited to Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Insurance Co. of America, 35 Cal. Rptr. 3d 496, 507 (Cal. Ct. App. 2005), in which the court of appeals held a voluntary dismissal with prejudice constituted a final adjudication on the merits. California law holds, "[R]es judicata operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action." Branson v. Sun-Diamond Growers, 29 Cal. Rptr. 2d 314, 320 (Cal. Ct. App. 1994) (emphasis added). The district court did not err in finding the doctrine of issue preclusion applies to subsequent suits involving a party in privity.

The plaintiffs argue the court erred in failing to apply California law regarding privity. They cite to California Code of Civil Procedure section 877, which states that where a dismissal with prejudice is given before a verdict or judgment to one or more tortfeasors claimed to be liable for the same tort, it does not discharge any other such party from liability unless the terms of a release so provide. However, the purpose of this section is to provide a "defensive" procedure by which a joint tortfeasor may extricate itself from a lawsuit through settlement and bar actions for equitable indemnity by the remaining joint tortfeasors. *Heppler v. J.M. Peters Co.*, 87 Cal. Rptr. 2d 497, 514 (Cal. Ct. App. 1999). This situation has no relevance in the current case, where the plaintiffs dismissed their claims against Fidelity without settlement or release.

The plaintiffs contend its fraudulent misrepresentation claim against Aistrope was not subject to res judicata because it was an intentional act and therefore, Aistrope was not acting as Fidelity's agent. The district court noted that a principal is vicariously liable for the intentional acts of their employees. See Turner v. Zip Motors, 245 Iowa 1091, 1097, 65 N.W.2d 427, 430 (1954) ("Masters, or principals, rarely authorize their servants, employees or agents to commit torts; yet if in the scope of his employment the master or principal places his employee or agent in a position to commit a fraud or other tort upon an innocent third party, such master or principal must be held to answer for the damage done, under the maxim of respondeat superior.").

In their petition, the plaintiffs allege Aistrope represented to them from February 2001 through 2003 that she was working to get the liens released and that those representations were false. In the California case against Fidelity, the plaintiffs alleged Fidelity "has not quieted or perfected [their] title to the Real Property" The representations allegedly made by Aistrope were made in conjunction with Fidelity's attempt to quiet or perfect title to the property. Aistrope was acting at Fidelity's agent. The California claim against Fidelity for failure to quiet or perfect title was dismissed and therefore was finally adjudicated. Accordingly, the plaintiffs are barred from asserting the fraud claim again in the present case.

Finally, the plaintiffs contend the defendants owed them an independent duty of reasonable care. They assert that Aistrope's position as a registered abstractor and Dakota Title's designation as a registered title and abstracting company requires them to independently exercise reasonable care in reporting all matters of public record adversely affecting title to a property.

In regard to Aistrope, the plaintiffs allege in their amended and substituted petition, "As to the acts and omissions of Aistrope asserted in this Petition, she at all times was acting with authority from and within the scope of her employment with Dakota Title." As decided by the trial court, "Plaintiffs' may not litigate against an agent that which they have already litigated against the principal."

AFFIRMED.